CJEU on centre of main interests (COMI) and its subsequent transfer (and Brexit) under the Insolvency Regulation 2015 in the case Galapagos BidCo, C-723/20

Under the Insolvency Regulation 2015, a transfer of the centre of main interests (COMI) of the debtor after lodging of the request for opening of insolvency proceedings affects the exclusive jurisdiction of the court seised with that application prior to the transfer?

This is the legal issue that the Court addresses in the judgement delivered this morning in the case Galapagos BidCo, C-723/20.

Factual context

A holding having its registered office in Luxembourg since 2014 contemplates, in June 2019, to move its actual centre of administration to England. In August 2019, its directors lodge a request before the High Court to have insolvency proceedings opened in respect of the debtor's assets.

The following day the directors are replaced by a new one, who sets up an office for the holding in Germany.

The request to have insolvency proceedings opened before the High Court is not withdrawn. Quite to the contrary, they seem to continue although a decision opening these proceedings has not yet been delivered.

That being said, a request for the opening of insolvency proceedings is lodged by the holding also with a German court.

This court orders preservation measures and appoints a temporary insolvency administrator. The capital market and bondholders are informed that the centre of administration of the holding have been move to Germany. However, the

second instance court ruling on an appeal introduced by the creditors reverses the order of the first instance and dismisses the debtor's request to have insolvency proceedings opened, due to the lack of international jurisdiction.

Next, the creditors request to have insolvency proceedings opened, still in Germany, in respect of the debtor's assets. The German court considers that it has jurisdiction to rule on the request as the centre of main interests of the holding is situated in Germany. It orders preservation measures and appoints a temporary insolvency administrator.

A subsidiary of the holding brings an appeal against the order. It argues that the German courts lack jurisdiction as the centre of administration of the holding has been moved to England in June 2019. The appeal is dismissed by the second instance court.

An appeal on a point of law is brought before the Bundesgerichtshof, which lodges a request for a preliminary ruling before the Court of Justice.

Preliminary questions

> *Is Article 3(1) of [the Insolvency Regulation 2015] to be interpreted as meaning that a debtor company the statutory seat of which is situated in a Member State does not have the centre of its main interests in a second Member State in which the place of its central administration is situated, as can be determined on the basis of objective factors ascertainable by third parties, in the case where, in circumstances such as those in the main proceedings, the debtor company has moved that place of central administration from a third Member State to the second Member State at a time when a request to have the main insolvency proceedings opened in respect of its assets has been lodged in the third Member State and a decision on that request has not yet been delivered?*
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> *If Question 1 is answered in the negative:*
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> *Is Article 3(1) of [the Insolvency Regulation 2015] to be interpreted as meaning that: the courts of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to have insolvency proceedings opened retain international jurisdiction*

to open those proceedings if the debtor moves the centre of its main interests to the territory of another Member State after lodging the request but before the decision opening insolvency proceedings is delivered, and such continuing international jurisdiction of the courts of one Member State excludes the jurisdiction of the courts of another Member State in respect of further requests to have the main insolvency proceedings opened received by a court of that other Member State after the debtor has moved its centre of main interests to that other Member State?

The judgement of the Court

The Court decided to answer the preliminary question without first requesting its Advocate General to present an Opinion.

In its judgement, the Court focuses its attention on the second preliminary question.

Its considers that, by this question, which it is appropriate to examine first, the referring court seeks to establish, in substance, whether Article 3(1) of the Insolvency Regulation 2015 is to be interpreted as meaning that the court of a Member State to which an application for the opening of main insolvency proceedings has been made retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is transferred to another Member State after that application has been lodged but before that court has given a decision on it (paragraph 24).

The Court answers in the sense that **the court of a Member State seised of an application for the opening of main insolvency proceedings retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is transferred to another Member State after the application has been lodged but before that court has given a ruling on it**. Consequently, and insofar as that Regulation remains applicable to that application, **the court of another Member State subsequently seised of an application made for the same purpose may not, in principle, assume jurisdiction to open main insolvency proceedings until the first court has given judgement and declined jurisdiction** (paragraph 40).

Having in mind the specificity of the case which concerns the UK, the Court makes some additional remarks as to the implications of Brexit. Indeed, the aforementioned passage relating to the fact that "the Regulation remains applicable to the application" echoes this issue.

In essence, the Court clarifies that if on the date of expiry of this transitional period (31 December 2020), High Court had still not ruled on the application for the opening of main insolvency proceedings (it seems that it is not clear whether this was the case), it would follow that Insolvency Regulation 2015 would no longer require that, as a result of this application, a court of a Member State, on the territory of which debtor's centre of main interests would be located, should refrain from declaring itself competent for the purposes of opening such proceedings (paragraphs 38 and 39)

Given the answer to the second question and having in mind that at least potentially the court seized first with the request for the opening of main insolvency proceedings may have retained its exclusive jurisdiction, the Court deems it not necessary to address the first preliminary question (paragraphs 41 to 43)

The judgement can be consulted here.